FOR ARGUMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

NICHOLAS J. LARIONOFF, JR., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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1. Respondents concede (Br. 22) that this case turns upon "an examination of Department of Defense directives concerning the [variable reenlistment bonus] program."[1]

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[1]Respondents contend (Br. 19-22) that Congress intended that a service member would be paid "the specific sum in effect at the time he makes the decision to extend his enlistment" (Br. 19). But as we indicated in our main brief (pp. 37-39), in enacting authorization for the award of variable reenlistment bonuses, Congress had focussed solely on the application of that program to reenlistments. We are not aware of any indication in the legislative history that either the Department of Defense or any member of Congress gave consideration to how, or even whether, the variable reenlistment bonus program would be applied to extensions of enlistment.

The variable reenlistment bonus program does apply to extensions of enlistment, but only as a consequence of 37 U.S.C. 906, which provides generally that "[a] member * * * who extends his enlistment * * * is entitled to the same pay and allowances as though he had reenlisted." Thus the Department of Defense was left with the task of accommodating the program to a group—service members who extend their enlistments—that had not been within the explicit contemplation of Congress when the program was enacted.

The pertinent Department of Defense instructions provide that "[a]n enlisted member is eligible to receive a Variable Reenlistment Bonus if he * * * [h]as completed at least 21 months of continuous active service other than active duty for training immediately prior to * * * extension of enlistment" and that "[m]embers * * * will receive the award level effective on the date of their * * * extension of enlistment * * *." DOD Instruction 1304.15, paras. V.B.1. and VI.A. (App. 59, 64). The crucial term in each of these two provisions is "extension of enlistment." If that term refers to the date the extension agreement is signed, then none of the named respondents is eligible for a variable reenlistment bonus, because none had completed 21 months of service before signing his extension agreement. See pp. 4-5, n. 4, of our main brief.[2] On the other hand, if the term "extension of enlistment" refers to the time at which service of the extension begins, none of the respondents is entitled to a variable reenlistment bonus because at that time the effective award level was zero. See p. 11 of our main brief.[3] In short, respondents are not aided by either construction.[4]

Respondents perforce rely (Br. 27-28) on a regulatory exception to the general rule that service members receive a bonus computed on the basis of the award level effective on the date of their extension of enlistment. That reliance,

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[2]Respondents' argument (Br. 24-27) that "extension of enlistment" refers to the date on which the extension agreement is signed therefore is self-defeating.

[3]Moreover, by the time respondent Johnson began service of his extension, Congress had repealed the variable reenlistment bonus program. See p. 11, n. 23, of our main brief.

[4]For the reasons stated in our main brief (pp. 26-30), however, the term "date of * * * extension of enlistment," properly construed, refers to the date on which service of the extension begins.

however, derives from a misunderstanding of how the exception operates. The exception on which respondents rely pertains to service members whose military specialties have been designated for reduction or termination of award level. See DOD Instruction 1304.15, paras. V.B.1.f. and VI.A. (App. 61, 64). When service of the extension begins after the 90-day advance notification of reduction or termination of award but before actual reduction or termination, the general rule is that the service member is entitled to the higher award level that is still in effect; the exception is that if the extension agreement was signed after receipt of the 90-day notice, the bonus is computed as if the award level had been reduced or terminated on the date of receipt of the notice. See pp. 30-34 of our main brief. In short, the exception upon which respondents rely serves only to reduce the bonuses of the service members to which it applies. It does not avail respondents.[5]

Thus, respondents' claims to variable reenlistment bonuses are governed by the general rule that service members "receive the award level effective on the date of their * * * extension of enlistment * * *." DOD Instruction 1304.15, para. VI.A. (App. 64).[6] As we have demonstrated (p. 2, *supra*), whether the term "extension of

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[5]The exception does not, in any event, apply to respondents, for they signed their extension agreements before receipt of the 90-day notice and began service of their extensions after the notice of termination became effective. See pp. 4-5, n. 4, and p. 11 of our main brief.

[6]Respondents' extension agreements were entered into in consideration of "the pay, allowances, and benefits which will accrue" (*e.g.*, App. 157) under the applicable statutes and regulations. Thus the agreements promise nothing more than is provided by the regulations.

enlistment" refers to the signing of the extension agreement or to the commencement of service of the extension, respondents take nothing under that rule. Accordingly, they are not entitled to the payment of variable reenlistment bonuses.

2. Respondent Johnson argues (Br. 31-34) that if, at the time he signed his extension agreement, he acquired a vested right to payment of a variable reenlistment bonus computed on the basis of the award level then in effect,[7] Congress acted unconstitutionally in terminating the variable reenlistment bonus program in a manner that deprived him of payment. As we have shown, however, the governing military regulations did not confer upon respondents vested rights to payment of variable reenlistment bonuses. See pp. 1-4, *supra*; pp. 19-41 of our main brief.[8] We would concede that

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[7]Respondents throughout characterize their claim as one to "the specific sum" (*e.g.*, Br. 19) in effect at the time the extension agreements were signed. But "[t]he amount of the bonus was calculated under a formula, so that the exact amount was not predictable at the time the reenlistment [*sic*] extension agreements were signed * * *." *Carini* v. *United States*, 528 F. 2d 738, 740 (C.A. 4), petition for a writ of certiorari pending, No. 75-1695.

[8]Respondents argue (Br. 28-29) that the legislative history of the Bonus Revision Act, Pub. L. 93-277, 88 Stat. 119, in which Congress terminated the variable reenlistment bonus program, indicates the Navy's understanding that persons in respondents' positions had a vested right to payment of the bonus. They rely upon a statement in the Conference Report indicating the Navy's "concern that the language of the bill might be interpreted to require it to abrogate an understanding it had with enlistees * * *." H.R. Rep. No. 93-985, 93d Cong., 2d Sess. 4 (1974). But respondents have overlooked the preceding sentence in the Report, which explains that the "understanding" in question related to "cases where commitment has been made to a man with a four-year enlistment and a two-year extension that he can cancel the two-year extension and reenlist for four years and receive a reenlistment bonus for the four-year reenlistment." *Ibid.* The Conference Committee met the Navy's particularized concern with respect to such commitments by

if the regulations had conferred such a vested right, the absence of an appropriate saving clause in the legislation terminating the variable reenlistment bonus program would cast doubt on the constitutional validity of that legislation. Cf. *Perry* v. *United States*, 294 U.S. 330; *Lynch* v. *United States*, 292 U.S. 571.[9] But this consideration further supports our reading of the governing regulations, a reading that does not draw into question the validity of an Act of Congress. Cf. *Crowell* v. *Benson*, 285 U.S. 22, 62 ("When the validity of an act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."). See generally *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 346-348 (Brandeis, J., concurring).

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stating that "full entitlement to SRB [*i.e.*, the new selective reenlistment bonus] will be authorized for personnel who have already agreed to an extension period prior to the enactment of the legislation if they subsequently cancel this extension prior to its becoming operative and reenlist for a period of at least two years beyond the period of the canceled extension." *Ibid.* The Report does not refer to variable reenlistment bonuses, and nothing in the Report suggests that either the Navy or the Committee believed that persons in respondents' positions had acquired vested rights to payments of such bonuses. See *Collins* v. *Rumsfeld*, 542 F. 2d 1109, 1111 (C.A. 9), petition for a writ of certiorari pending *sub nom. Saylors* v. *United States*, No. 76-677.

[9]The Navy presumably could have written its extension agreements in a manner that, while leaving open the possibility that Congress would terminate the bonus program altogether, nevertheless precluded the Navy from reducing the award level applicable to service members' military specialties. See *Carini* v. *United States*, *supra*, 528 F. 2d at 741, n. 7. But we see no basis for construing the agreements and regulations as precluding the Navy from reducing the applicable award levels as its personnel requirements changed.

For the reasons stated here and in our main brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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APRIL 1977.